

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 7, 2004

STATE OF TENNESSEE v. ROBERT THOMAS HARRIS

Appeal from the Circuit Court for Bedford County
No. 15009 F. Lee Russell, Judge

No. M2002-01943-CCA-R3-CD - Filed July 13, 2004

The defendant, Robert Thomas Harris, pled guilty to driving on a revoked license, fourth offense. A jury found the defendant guilty of felony evading arrest and driving under the influence, sixth offense. The trial court imposed sentences of eleven months and twenty-nine days for driving on a revoked license, twelve years for felony evading arrest, and six years for DUI. The sentences were ordered to be served concurrently. The defendant was sentenced as a career offender. See Tenn. Code Ann. § 40-35-108(a)(3). In this appeal of right, the defendant argues that the trial court erred by concluding that he was a career offender. The judgments of the trial court are affirmed.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

Gregory D. Smith, Clarksville, Tennessee (on appeal), and Andrew Jackson Dearing, III, Assistant Public Defender (on appeal and at trial), for the appellant, Robert Thomas Harris.

Paul G. Summers, Attorney General & Reporter; J. Ross Dyer, Assistant Attorney General; and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At approximately 3:00 A.M. on September 19, 2001, Officer Trey Clanton of the Shelbyville Police Department observed a white Cadillac traveling west in the eastbound lane of Depot Street. Officer Clanton, who was in a marked patrol car, activated his blue lights and, when the vehicle did not stop, turned on his siren. When the officer pursued, the defendant drove through an intersection, where he "appeared to slide through the intersection . . . half the car was actually in the grassy part and the back half of the car was on the roadway." Officer Clanton parked his patrol car behind the defendant's car and the defendant backed his vehicle into the patrol car on two separate occasions in an attempt to return to the roadway. The defendant did not stop until Officer Clanton stepped out of his patrol car and ordered him to turn the vehicle off. The officer smelled alcohol but the

defendant refused a Breathalyzer test. Although there were no field sobriety tests, the jury observed a videotape of the incident during the trial.

In this appeal, the defendant argues that he should not have been classified as a career offender with regard to the convictions for fourth offense driving on a revoked license, and sixth offense driving under the influence. The defendant submits that Tennessee Code Annotated section 40-35-108(b)(4), otherwise known as the twenty-four-hour merger rule, bars the consideration of three of the offenses used to establish his status as a career offender. He specifically contends that the two forgeries and an automobile burglary dated October 12, 1995, should have been considered one offense and that in consequence, the state failed to prove the requisite number of prior offenses. The defendant also argues that the offense committed October 13, 1995, a burglary, should not have been counted separately under the twenty-four-hour merger rule.

In determining that the defendant qualified as a career offender, the trial court concluded as follows:

It is my conclusion that [the defendant] has six prior felony convictions. He is a career offender [The] first would be the auto burglaries . . . [on] [October 12,] 1995. The two forgeries would be the second and I would count the two together. Again, we have the offense date of [October 12,] 1995. But, as [the defendant] has very honestly explained to us, that those were separate offenses and separate victims on the same day, now [that is] two. On [October 13,] 1995, is a separate burglary of the Corner Market . . . on Eagle Boulevard, different location and different date of the offense. So, we are at three. . . . [W]e find a conviction for second degree auto burglary . . . [on July 13, 1989]. So, that is clearly separate and is a felony. And that is four. . . . And then we have a conviction for attempt to commit a felony, a one-year sentence itself is a felony and another separate date in August of [19]87, so, we are up to five. And then directing your attention to [a] . . . fraudulent breach of trust, again, a felony, it carries a one[-]year sentence. The offense date there, June 8, 1989, so, we have six prior felony convictions and we have a career offender here.

When a criminal defendant challenges the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

When determining the length of the sentence, the trial court must first determine the appropriate offender status based upon the prior criminal record of the defendant. See Tenn. Code Ann. § 40-35-104 to 109. The court must next determine the appropriate range in order to establish the minimum and maximum sentences available. Id. A defendant who is convicted of a Class D or E felony and has at least six prior felony convictions of any classification should be classified as a "career offender." Tenn. Code Ann. § 40-35-108(a)(3).

Tennessee Code Annotated section 40-35-108(b)(4), referred to as the twenty-four-hour merger rule, provides as follows:

Convictions for multiple felonies committed as a part of a single course of conduct within twenty-four (24) hours constitute one (1) conviction for the purpose of determining prior convictions; however, acts resulting in bodily injury or threatened bodily injury to the victim or victims shall not be construed to be a single course of conduct[.]

Tenn. Code Ann. § 40-35-108(b)(4).

Initially, the state concedes that the two forgery convictions dated October 12, 1995, should have been merged into one offense. The record establishes that the trial court, in fact, determined that those offenses would be treated as a single offense. The record also establishes that the remaining convictions do not, however, fall within the merger rule because they were not part of "a single course of conduct within twenty-four hours" as contemplated by the statute. See Tenn. Code Ann. § 40-35-108(b)(4). At the sentencing hearing, defendant admitted that the two convictions for forgery were not a part of the course of conduct relating to the auto burglary which took place on October 12 or the burglary which took place on October 13, 1995. The auto burglary and the forgery involved two different victims and, as acknowledged by the defendant, were not related in any way. In attempting to establish the defendant's status as a career offender, the state proved the following prior felony offenses:

	Conviction	Offense Date
1.	Auto burglary	October 12, 1995
2.	Forgery	October 12, 1995
3.	Forgery	October 12, 1995
4.	Burglary	October 13, 1995
5.	Second Degree Burglary	July 13, 1989
6.	Attempt to Commit Felony	August 1987
7.	Fraudulent Breach of Trust	June 8, 1989

As the trial court observed, even with the merger of the two forgery offenses, there remained six qualifying offenses. Although the burden of proof was on the state to establish the appropriate sentence range, the record supports the finding of the trial court that the defendant qualified as a

career offender. See State v. Cummings, No. 03C01-9403-CR-00083 (Tenn. Crim. App., at Knoxville, Aug. 23, 1995).

Accordingly, the judgments are affirmed.

GARY R. WADE, PRESIDING JUDGE